

*a***MSIMANGA LESALY****v.****PP***b*

COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
HASHIM YUSOFF JCA
TENGKU BAHARUDIN SHAH JCA
[CRIMINAL APPEAL NO: K-05-29-1999]
28 SEPTEMBER 2004

c

CRIMINAL PROCEDURE: Charge - Framing of - Whether defective - Accused jointly tried with co-accused for trafficking in dangerous drug - Co-accused acquitted at close of prosecution case - Charge against accused not properly amended to erase all references to 'common intention' - Whether renders charge bad - Whether accused understood nature of charge - Whether accused mislead or prejudiced - Penal Code, s. 34

*d**e*

CRIMINAL PROCEDURE: Charge - Alteration of - Recall of witnesses - Whether court duty-bound to notify accused of right to recall witnesses or call further evidence - Whether accused represented by counsel - Whether failure of court to notify accused amounts to procedural illegality - Criminal Procedure Code, ss 159, 162

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EVIDENCE: Statement - Exculpatory statements - Oral statement made to police officer on arrest - Caution-statement under s. 37A Dangerous Drugs Act 1952 - Caution not properly administered - Whether statements wholly inadmissible - Whether only inadmissible upon accused's objection - Whether accused can waive breach and have statements admitted - Rules of admissibility, whether operates in favour of accused only

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EVIDENCE: Statement - Exculpatory statements - Oral statement made to police officer on arrest - Caution-statement under s. 37A Dangerous Drugs Act 1952 - Whether trial judge can exclude accused's evidence on ground that it is prejudicial to co-accused - Whether discretion of trial judge to exclude such evidence only exercisable as against prosecution

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EVIDENCE: Statement - Exculpatory statements - Oral statement made to police officer on arrest - Caution-statement under s. 37A Dangerous Drugs Act 1952 - Whether can be used by prosecution against co-accused under s. 30 Evidence Act 1950 - Whether statements amounted to a confession within s. 17(2) Evidence Act 1950 - Whether purely exculpatory statements

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EVIDENCE: *Statement - Exculpatory statements - Oral statement made to police officer on arrest - Caution-statement under s. 37A Dangerous Drugs Act 1952 - Statements wrongly excluded by trial judge - Whether conviction unsafe - Whether there was substantial miscarriage of justice - Whether admission of such prior consistent statements would have added anything to accused's oral testimony*

*a**b*

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B - Trafficking in dangerous drugs - Rule against double presumptions - Whether trial judge relied on double presumptions to convict accused of trafficking - Whether trial judge made express and affirmative evidential findings on possession and trafficking independent of presumptions under s. 37 Dangerous Drugs Act 1952*

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The appellant, a woman of Nigerian nationality, was charged and convicted in the High Court for trafficking in 686.3g of heroin under s. 39B Dangerous Drugs Act 1952 ('DDA') and was sentenced to death. Before the trial judge, evidence was led to show that the appellant and her companion ('the co-accused') were searched at the Thai-Malaysian immigration check-point by a customs officer ('PW4'), whereupon heroin was found inside the appellant's slippers and from around her waist. At the close of the case for the prosecution, the trial judge acquitted the co-accused but called upon the appellant to enter on her defence.

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In her defence, the appellant submitted that the charge against her, as amended after the conclusion of the case for the prosecution, was defective as it still contained the allegation that the offence was committed by two persons in furtherance of a common intention; it was argued that the amended charge should have stated that the drugs were being trafficked solely by the appellant. The appellant also contended that the learned judge ought to have informed her, upon the amendment of the charge, that she had a right to recall any of the prosecution's witnesses pursuant to s. 159 and 162 Criminal Procedure Code ('CPC').

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Further, the appellant had, upon her arrest earlier, made oral statements in the presence of a customs officer ('PW6') and, subsequently, a caution-statement under s. 37A DDA. The appellant had sought to admit these statements as they were exculpatory of her (although inculpatory of the co-accused) but the learned judge had excluded them and disallowed the cross-examination of PW6 on the ground that the appellant had not been properly cautioned and, therefore, anything she said would have been inadmissible. Lastly, the appellant contended that the trial judge had erred in invoking the presumption of trafficking under s. 37(da) DDA stacked upon the presumption of possession under s. 37(d) DDA.

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- a* Before the justices of the Court of Appeal, the questions that arose for decision were: (i) whether the charge against the appellant (as amended) was defective; (ii) whether the trial judge was duty-bound to inform the appellant of her right to recall the prosecution's witnesses under ss. 159 and 162 CPC; (iii) whether the trial judge was right in excluding the appellant's statement (upon arrest)
- b* and her caution-statement; and (iv) whether the trial judge had breached the rule against double presumptions.

Held (dismissing the appeal)

Per Gopal Sri Ram JCA delivering the judgment of the court:

- c* [1] Although the amendments failed to completely cleanse the original charge of all its references to the appellant having committed the offence together with the co-accused in furtherance of a common intention, yet this did not make the amended charge bad. This was because s. 34 Penal Code does not create a substantive offence; it is merely a rule of evidence inferring joint responsibility for a criminal act performed by a
- d* plurality of persons. Indeed, the appellant was fully cognisant of the nature of the charge being brought against her. The minor defects in the charge did not mislead or prejudice the appellant at all. (pp 406 e-g & 407 b-c)
- e* [2] Where an accused is represented by counsel, it is unnecessary for the court to draw counsel's attention to s. 162 CPC or to inquire whether counsel intends to exercise the right conferred by the said section. There is no such duty or obligation on the part of the court; thus, any omission in respect thereof does not amount to procedural illegality. (pp 407 h & 408 a-b)
- f* [3a] A statement from an accused person that is not recorded in accordance with the provisions of the law is inadmissible if, but only if, the accused objects to its admission in evidence. Rules against the admissibility of evidence are procedural safeguards to ensure that an accused person receives a fair trial; the protection operates in his favour and is open to him whether or not he avails himself of it. Thus, it is no infringement of an accused's procedural rights if he waives a breach of s. 37A DDA (or any equipollent statutory rule of procedure) and asks for the admission of a statement so recorded from him. It merely means that the accused has chosen not to assert a procedural objection open to him.
- g* (pp 408 e, h, 409 a-b & 411 f)
- h* [3b] At common law, the accused is always entitled to have relevant evidence adduced in his favour, notwithstanding that such evidence may be adverse to a co-accused. Thus, evidence exculpatory of an accused or that which raises a reasonable doubt as to his guilt is highly relevant
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and admissible. A co-accused cannot object to the admission of such evidence on the ground that it implicates him. Of course, a trial judge has the discretion to exclude evidence the prejudicial effect of which outweighs its probative value. However, that discretion is reserved only as against the prosecution; it has no application where an accused seeks the admission of evidence prejudicial to a co-accused. Consequently, both the exculpatory oral-statement and caution-statement made by the appellant were relevant and admissible. That they were prejudicial to the co-accused was of no consequence. The trial judge had no discretion to exclude them on that very ground. (pp 409 c-h, 410 a-e & 411 f)

[3c] The only circumstance wherein the appellant's statements could have been used by the prosecution against the co-accused was under s. 30 Evidence Act 1950, namely, that they constituted a confession in the terms of s. 17(2) thereof. The appellant's statements herein, however, were not confessions but purely exculpatory statements; hence they could not have been used against the co-accused. (pp 410 f-h & 411 a-e)

[3d] Although the trial judge had erred in excluding the appellant's statement (upon arrest) as well as her caution-statement, yet there was no substantial miscarriage of justice occasioned rendering the appellant's conviction unsafe. This was because the appellant's oral testimony was substantially the same as her excluded out-of-court statements; and the trial judge had found that the appellant did not stand up well to cross-examination and that she was not a credible witness. Indeed, he had found that her oral evidence did not raise a reasonable doubt in the prosecution's case. Hence, the appellant's out-of-court statements, even if admitted, would not have added anything further to her oral evidence. (pp 411 g-h & 412 a, e)

[3e] The mere fact that an accused's oral testimony is consistent with his previous out-of-court statements does not require the court to hold in every case that he is a witness of truth. (p 412 b-c)

[4] The trial judge had found, as a fact, that there was direct evidence of trafficking against the appellant; it was only after he had determined that the appellant was actually trafficking the heroin that she had in her possession that he convicted her. Such an inference from the direct evidence was independent of any presumptions under the DDA. It was clear beyond a reasonable doubt that the appellant was trafficking the heroin from Thailand into Malaysia. (pp 412 f-h, 413 h, 414 a & 415 b-e)

[Conviction and sentence affirmed.]

a [Bahasa Malaysia Translation Of Headnotes]

b Di Mahkamah Tinggi, perayu, seorang wanita warga Nigeria, telah dituduh dan disabitkan dengan kesalahan mengedar 686.3g heroin di bawah s. 39B Akta Dadah Berbahaya 1952 ('DDA') dan dijatuhkan hukuman mati. Di hadapan hakim bicara, keterangan telah dikemukakan bagi menunjukkan bahawa perayu dan temannya ('rakan setuduh') telah diperiksa di pusat pemeriksaan imigresen di sempadan Malaysia-Thai oleh seorang pegawai kastam ('PW4'), di mana heroin telah jumpai pada slipar perayu dan dikeliling pinggangnya. Di akhir kes pendakwaan, hakim bicara membebaskan rakan setuduh tetapi memanggil perayu untuk membela diri.

c Dalam pembelaannya, perayu menyatakan bahawa pertuduhan terhadapnya, sepertimana yang dipinda selepas penutupan kes pendakwaan, adalah cacat kerana masih mengandungi dakwaan bahawa kesalahan dilakukan oleh dua orang dengan niat bersama; ianya diujah bahawa pertuduhan terpinda *d* seharusnya menyatakan bahawa dadah telah diedar olehnya sahaja. Perayu juga berkata bahawa yang arif hakim sepatutnya memberitahu beliau, sewaktu pertuduhan dipinda, bahawa beliau berhak memanggil semula saksi-saksi pendakwa di bawah ss. 159 dan 162 Kanun Prosedur Jenayah ('CPC').

e Selanjutnya, perayu, semasa ditangkap, telah membuat kenyataan lisan di hadapan seorang pegawai kastam ('PW6'), dan selepas itu, kenyataan beramaran di bawah s. 37A DDA. Perayu memohon untuk mengemukakan kenyataan-kenyataan ini kerana ianya membebaskan beliau dari pertuduhan (walaupun menyabitkan rakan setuduh), tetapi yang arif hakim telah menolaknya serta enggan membenarkan pemeriksaan-balas PW6 atas alasan *f* bahawa perayu tidak diberikan amaran yang sewajarnya dan, dengan itu, apa yang beliau nyatakan itu tidak boleh diterima-masuk. Akhir sekali, perayu menegaskan bahawa hakim bicara telah silap kerana menggunapakai andaian pengedaran di bawah s. 37(da) DDA di atas andaian milikan di bawah s. 37 DDA.

g Di hadapan hakim-hakim Mahkamah Rayuan, persoalan yang berbangkit adalah: (i) sama ada pertuduhan terhadap perayu (seperti yang dipinda) cacat; (ii) sama ada hakim bicara berkewajipan untuk memberitahu perayu haknya untuk memanggil semula saksi-saksi pendakwa di bawah ss. 159 dan 162 CPC; (iii) sama ada hakim bicara betul apabila mengenyepikan kenyataan perayu *h* (ketika tangkapan) dan kenyataan beramarannya; dan (iv) sama ada hakim bicara melanggar kaedah yang menolak andaian berganda.

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Diputuskan (menolak rayuan)**Oleh Gopal Sri Ram HMR menyampaikan penghakiman mahkamah:**

- [1] Walaupun pindaan gagal menghapus sepenuhnya rujukan kepada perayu di dalam pertuduhan asal sebagai telah melakukan kesalahan atas niat bersama dengan rakan setuduh, namun ia tidak menjadikan pertuduhan terpinda itu cacat. Ini kerana s. 34 Kanun Keseksaan tidak mencipta suatu kesalahan substantif; ia hanyalah suatu kaedah keterangan yang membangkitkan tanggungan bersama bagi suatu kesalahan jenayah yang dilakukan oleh lebih dari seorang. Malah, perayu amat sedar akan sifat pertuduhan yang dihadapkannya. Kecacatan-kecacatan kecil pada pertuduhan tidak langsung mengelirukan ataupun memprejudis perayu.
- [2] Di mana seorang tertuduh diwakili peguam, adalah tidak perlu bagi mahkamah untuk mengingatkan peguam tersebut kepada s. 162 CPC atau untuk bertanya sama ada peguam berhasrat untuk menggunakan hak yang diberikan oleh seksyen itu. Tidak terdapat kewajipan seperti itu atas mahkamah; oleh yang demikian, sebarang peninggalan berbuat demikian tidak menjadikannya suatu ketaksahan prosedur.
- [3a] Suatu kenyataan dari seorang tertuduh yang tidak direkod mengikut peruntukan undang-undang tidak boleh diterima masuk sekiranya, dan hanya sekiranya, tertuduh membantah terhadap penerimaan masuk itu. Kaedah-kaedah mengenai penerimaan masuk keterangan adalah suatu perlindungan prosedur bagi memastikan seseorang tertuduh dibicarakan dengan adil; perlindungan sedemikian beroperasi bagi manfaat dirinya dan sentiasa terbuka kepadanya sama ada ia ingin menggunakannya ataupun tidak. Oleh itu, ia bukanlah pelanggaran terhadap hak prosedur tertuduh sekiranya beliau sendiri mengenyepikan kemungkinan terhadap s. 37 DDA (atau mana-mana kaedah statutori sepertinya) dan meminta supaya kenyataan yang direkodkan darinya itu diterima masuk. Ia hanya bermakna bahawa tertuduh memilih untuk tidak membuat bantahan prosedur yang terbuka kepadanya.
- [3b] Di sisi common law, tertuduh sentiasa berhak untuk membentangkan keterangan-keterangan yang berpihak kepadanya, tanpa mengira sama ada keterangan itu memudaratkan rakan setuduh. Dengan demikian, sebarang keterangan yang membebaskan tertuduh ataupun yang membangkitkan keraguan munasabah mengenai kebersalahannya adalah sangat relevan dan boleh diterima masuk. Seseorang rakan setuduh tidak boleh membantah kepada kemasukan keterangan sedemikian atas alasan ianya membabitkan beliau dalam kesalahan. Tentunya, hakim bicara mempunyai budi bicara untuk menyingkir keterangan di mana kesan prejudisnya mengatasi nilai probatifnya. Apapun, budi bicara sedemikian hanya

- a* dikhasikan terhadap pendakwaan; ia tidak terpakai di mana tertuduh memohon diterima masuk keterangan yang memprejudis rakan setuduh. Oleh yang demikian, kedua-dua kenyataan lisan yang membebaskan dan kenyataan beramaran yang dibuat oleh perayu adalah relevan dan boleh diterima masuk. Bahawa ianya memprejudis rakan setuduh tidak penting.
- b* Hakim bicara tiada budi bicara untuk menolaknya atas alasan tersebut.
- [3c]* Satu-satunya keadaan di mana pendakwaan boleh menggunakan kenyataan perayu terhadap rakan setuduh adalah di bawah s. 30 Akta Keterangan 1950, iaitu, bahawa ianya merupakan suatu pengakuan-salah menurut maksud s. 17(2) Akta tersebut. Kenyataan perayu di sini,
- c* bagaimanapun, bukan pengakuan-salah tetapi semata-mata kenyataan yang membebaskan; makanya ia tidak boleh digunakan terhadap rakan setuduh.
- [3d]* Walaupun hakim bicara silap dalam mengenyepikan kenyataan perayu (ketika tangkapan) serta kenyataan beramarannya, namun, tidak terdapat salah arahan berat yang menjadikan sabitan perayu sebagai tidak selamat. Ini kerana testimoni lisan perayu secara matannya adalah sama seperti kenyataan-luar-mahkamah yang diketepikan itu; hakim bicara juga mendapati bahawa keterangan perayu semasa pemeriksaan-balas tidak menyakinkan dan bahawa beliau bukanlah seorang saksi yang boleh dipercayai. Malah beliau mendapati bahawa keterangan lisan perayu gagal membangkitkan sebarang keraguan munasabah terhadap kes pendakwa. Oleh yang demikian, kenyataan-luar-mahkamah perayu, jikapun diterima masuk, tidak akan menambah apa-apa kepada keterangan lisannya.
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- f* *[3e]* Fakta bahawa testimoni lisan perayu adalah konsisten dengan kenyataan-luar-mahkamah bukanlah alasan untuk mahkamah membuat rumusan dalam setiap kes bahawa beliau adalah seorang saksi yang benar.
- g* *[4]* Hakim bicara mendapati, sebagai perkara fakta, bahawa wujud keterangan langsung mengenai pengedaran terhadap perayu; begitu juga, beliau hanya mensabitkan perayu selepas memutuskan bahawa perayu sebenarnya telah mengedar heroin yang ada dalam milikannya. Inferens dari keterangan langsung sedemikian adalah bebas dari sebarang andaian di bawah DDA. Ianya jelas di luar keraguan munasabah bahawa perayu telah mengedar dadah dari Thailand ke Malaysia.
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Sabitan dan hukuman dikekalkan.]

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Case(s) referred to:

Chota Abdul Razak v. PP [1991] 3 MLJ 77 (*refd*)
Chow Kok Keong v. PP [1998] 2 CLJ 469 FC (*refd*)
Cohen Lorraine Phillis & Anor v. PP [1989] 3 MLJ 289
Goi Ching Ang v. PP [1999] 1 CLJ 829 FC (*refd*)
Lim Yow Choon v. PP [1972] 1 MLJ 205 (*refd*)
Lobban v. The Queen [1995] 1 WLR 877 (*fol*)
Looi Kow Chai v. PP [2003] 1 CLJ 734 CA (*refd*)
Moosa Abdul Rahiman v. The State of Kerala [1982] Cr LJ 1384 (*fol*)
Muhammed Hassan v. PP [1998] 2 CLJ 170 FC (*refd*)
Ong Ah Chuan v. PP [1981] 1 MLJ 64 (*fol*)
PP v. Datuk Hj Harun Idris [1977] 1 MLJ 14 (*refd*)
PP v. Mohamed Noor Jantan [1979] 2 MLJ 289 (*refd*)
R v. Miller [1952] 36 Cr App R 169 (*fol*)
Teh Thiam Huat v. PP [1996] 3 SLR 631 (*fol*)
Queen-Empress v. Jagrup [1885] ILR 7 All 646 (*refd*)

Legislation referred to:

Criminal Procedure Code, ss. 159, 162
Dangerous Drugs Act 1952, ss. 37A, 39B
Evidence Act 1950, ss. 17(2), 30
Penal Code, s. 34

Misuse of Drugs Act 1973 [Sing], ss. 2, 3, 6, 10, 15

Other source(s) referred to:

Keane's Modern, *Law of Evidence*, 3rd edn, 1994, p 36

For the appellant - Zainal Ithnin; M/s Zainal Ithin & Partners

For the respondent - Kamaruzaman Ab Jalil DPP

[Appeal from High Court, Alor Setar; Criminal Case No: 45-11-97]

Reported by Alex KC Lee

JUDGMENT**Gopal Sri Ram JCA:**

The appellant, a Nigerian national was charged for an offence of trafficking 686.3 grams of heroin. She was convicted of an offence under s. 39B of the Dangerous Drugs Act 1952 ("the Act") and sentenced to the mandatory death sentence. She appealed. We heard her appeal on 8 September 2004 and dismissed it. Our reasons now follow.

The appellant and another person boarded a taxi at Haadyai in Thailand. They were headed for Penang. There were two other passengers on board. When the taxi arrived at the Malaysian Immigration and Customs Check Point at Bukit Kayu Hitam all passengers alighted. Their passports were examined.

- a* There was nothing suspicious about them. At that point, PW4, a Customs Officer asked the appellant to remove her slippers. Obviously his suspicions were aroused when he found them fairly heavy. The slippers were probed with a needle and traces of a white powdery substance were found. The slippers were then split open and from them were recovered a total of 6 packets of a
- b* white powdery substance. The appellant was searched. 5 more packets of a white powdery substance were found around her waist. The appellant and her companion were arrested. Subsequent chemical examination and analysis revealed that the 11 packets contained heroin weighing 686.3 grams. The appellant and her companion were charged. At the ensuing trial the latter was
- c* acquitted. However, the learned trial judge Hishamuddin J, in a carefully considered judgment convicted the appellant and passed sentence of death.

- Before us the conviction was attacked on four main grounds. First, the charge as amended at the close of the prosecution's case was defective. Second, although the amended charge was read to the appellant, there was non-
- d* compliance with the second limb of s. 159 and s. 162 of the Criminal Procedure Code when read together. Third, the judge was wrong in excluding the appellant's cautioned statement on the application of counsel for the co-accused and that the appellant had thereby been prejudiced. Fourth, the learned judge had infringed the rule against double presumptions.

- e* Taking the first ground, it is important to recall that the appellant was initially charged with another person. Accordingly, the charge carried in it the allegation that the two accused had acted in furtherance of a common intention under s. 34 of the Penal Code. Once the co-accused was acquitted at the close of the prosecution's case, the allegation of common intention fell to the ground.
- f* The charge had to be amended to reflect the fact that the appellant had solely trafficked in the drug in question. It was. But the wording in the charge was not so perfectly amended as to rid itself of all references to the element of the appellant having acted with another person. That in our view does not render the charge bad. For, it is well settled law that s. 34 of the Penal Code
- g* does not create a substantive offence but is merely a rule of evidence to infer joint responsibility for a criminal act performed by a plurality of persons: *Chota bin Abdul Razak v. Public Prosecutor* [1991] 3 MLJ 77. In *Teh Thiam Huat v. Public Prosecutor* [1996] 3 SLR 631, the same complaint was raised on appeal. Karthigesu JA dealt with it as follows:

- h* We should, however, mention that an issue was raised that as the capital charge of trafficking was a common intention charged and the learned judge having acquitted the other conspirator, Tay Bee Hoon, the conviction of the appellant without amending the charge was irregular. True, the learned judge did not amend the charge; he found that the appellant alone was in possession of the
- i* 40 sachets of heroin and that he failed to make good that he was in possession

of the 40 sachets for his and Tay Bee Hoon's consumption. Suffice it to say that section 34 of the Penal Code does not create a substantive offence; it lays down only a rule of evidence to infer joint responsibility (per Thean J (as he then was) in *Chota bin Abdul Razak v. PP* [1991] 3 MLJ 77; [1991] SLR 675). Accordingly there was nothing irregular about the appellant's conviction on the capital charge of trafficking.

Further, we have scrutinised the charge and the record of proceedings with care and we are satisfied that the appellant was in no way misled or prejudiced by the minor defect in the wordings in the charge. The way in which her defence was presented makes it amply clear that she fully appreciated the nature of the charge against her and, more importantly, the nature of the prosecution's case. It appears quite plain from her evidence both in chief and under cross examination that she knew without any difficulty whatsoever the case she had to meet. We are therefore satisfied that the error in the charge did not cause any prejudice or injustice whatsoever to the appellant. The first ground therefore fails.

Since the second ground of complaint relates to the violation of ss. 159 and 162 of the Criminal Procedure when read together, it is best that we set out these provisions in full. They read as follows:

159. If a charge is framed or alteration or addition made under either of the last two preceding sections, the Court shall forthwith call upon the accused to plead thereto and to state whether he is ready to be tried on such charge or altered or added charge. If the accused declares that he is not ready, the Court shall duly consider the reasons he may give and if proceeding immediately with the trial is not likely, in the opinion of the Court, to prejudice the accused in his defence or the prosecutor in the conduct of the case, the Court may, in its discretion, after such charge or alteration or addition has been framed or made, proceed with the trial as if the new or altered or added charge had been the original charge.

162. Whenever a charge is altered or added by the Court after the commencement of the trial the prosecutor and the accused shall be allowed to recall or re-summon and examine, with reference to such alteration or addition, any witness who may have been examined, and may also call any further evidence which may be material.

Learned counsel's submission is that the trial judge was obliged to inform the appellant of her right under s. 162 to recall any of the witnesses for the prosecution. And this though the appellant was represented by counsel. With respect we are unable to agree with this submission. In *Moosa Abdul Rahiman v. The State of Kerala* [1982] Cr. LJ 1384, the Full Bench of the High Court of Kerala held that s. 217 of the Indian Criminal Procedure Code 1974 which is in *pari materia* with our s. 162:

a does not cast a duty or obligation on the court to enquire of the prosecution or the accused whether they would like to recall or re-summon the witnesses ... or to call any further witnesses. The omission of the court to: enquire of the prosecution or the accused whether they would like to exercise the right of re-calling or re-summoning the witnesses would not result in any procedural illegality.

b With respect we agree with this proposition. Where an accused is represented by counsel it is unnecessary for the court to draw counsel's attention to s. 162 or to inquire whether counsel intends to exercise the right conferred by that section. We therefore find no merit in the second ground advanced on the appellant's behalf.

c The third ground of complaint is a little more substantive and requires a narrative. The appellant had, after her arrest made some oral statements in the presence of PW6, a Customs Officers at the scene. She had also made a cautioned statement under s. 37A of the Act after her arrest. Counsel for the appellant wanted both statements to be admitted because they were exculpatory of the appellant, though inculpatory of the co-accused. In respect of the oral statements, he attempted to cross-examine PW 6. But counsel for the co-accused objected. The learned judge upheld the objection and disallowed the appellant's proposed line of cross-examination on the ground that the appellant had not been properly cautioned and that therefore anything she said was inadmissible even at the behest of the defence.

d With respect we are unable to agree with the learned judge. In our judgment where a statement is not recorded in accordance with the provisions of law, it is only inadmissible if the accused objects to its admissibility but not otherwise. In *Public Prosecutor v. Mohamed Noor bin Jantan* [1979] 2 MLJ 289, the Federal Court speaking through Suffian LP held that:

e It is true that the general rule is that a cautioned statement is admissible only if the court is satisfied that it was made voluntarily, and if it is suggested by the defence that it has not been so made, a trial within a trial should be held – so that the prosecution can satisfy the court that the opposite is the case. But if, on the other hand, the defence does not challenge the voluntary nature of the statement, there is no reason whatsoever for holding a trial within a trial.

f The juridical basis for the foregoing conclusion is not difficult to find. Rules governing the admissibility of evidence are procedural and not substantive: See *Public Prosecutor v. Datuk Haji Harun bin Idris* [1977] 1 MLJ 14. Hence, a rule against admissibility of evidence is a procedural safeguard to ensure that an accused receives a fair trial and is therefore available for use in the accused's favour, whether he avails of it or not. So, we have the rule that in

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a criminal case, inadmissible evidence remains inadmissible even if the accused does not object to it. It is therefore no infringement of an accused's procedural rights if the accused waives any breach of s. 37A (or the procedural equipollent in any other statute) and asks for the admission of a statement recorded from him or her. All it means is that the accused does not choose to assert a procedural objection fairly open to him or her. Once admitted, the statement may be put to such use as is lawfully permitted. It does not mean, of course, as we shall later demonstrate that the court must swallow the accused's statement hook, line and sinker.

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At common law an accused is always entitled to have relevant evidence adduced in his or her favour, notwithstanding that such evidence may be adverse to a co-accused. Evidence that goes to show that an accused is not guilty of an offence or that raises a reasonable doubt as to his or her guilt is highly relevant and admissible. A co-accused cannot object to the admission of such evidence on the ground that it implicates him in the commission of the offence. Thus, in *R v. Miller* [1952] 36 Cr App R 169, where two persons were accused of evading import duties, Devlin J allowed an accused to cross-examine a witness called by the co-accused to show that the co-accused had spent time in prison. The relevance of this evidence was that it went to show that the co-accused was principally liable for the importations which supported the accused's case that he had not been involved in the offences charged. It so happened that in *Miller* the witness in question was called by the co-accused. But we cannot see that there is any difference in principle where the witness is one called by the prosecution.

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It is a well settled principle of law that a trial judge has a discretion to exclude evidence the prejudicial effect of which outweighs its probative value: *Goi Ching Ang v. PP* [1999] 1 MLJ 507. The existence of the discretion and its role where there is more than one accused person on trial was stated by Lord Steyn when delivering the advice of the Privy Council in *Lobban v. The Queen* [1995] 1 WLR 877 as follows:

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[A] trial judge in a criminal trial always has a discretion to refuse to admit evidence, which is tendered by the prosecution, if in his opinion its prejudicial effect outweighs its probative value. This power has probably existed since *R v. Christie* [1914] AC 545 but, in any event, it was expressly affirmed by the House of Lords in *R v. Sang* [1979] 2 All ER 1222, [1980] AC 402. The power is based on a judge's duty in a criminal trial to ensure that a defendant receives a fair trial. The width of the discretion is circumscribed by the purpose for which it exists. This common law discretion is the foundation of a judge's power to cause part of a written statement made by a defendant, which is adduced in evidence by the prosecution, to be edited in the interests of justice. It is wide enough to allow a trial judge to exclude evidence, which is tendered by the prosecution in a joint trial and is probative of the case against one co-

- a* defendant, on the ground that it is unduly prejudicial against another co-defendant. *R v. Rogers and Tarran* [1971] Crim LR 413 was such a case. In such cases it is in the interests of both defendants that the disputed part of the document be edited: the distinctive feature of the present case is that there was a conflict between co-defendants as to editing.
- b* The Judicial Committee, however, recognised a second and equally important principle. The discretion to exclude is reserved against the prosecution: it has no application where an accused seeks admission of prejudicial evidence against a co-accused. In his judgment Lord Steyn quoted a passage from *Keane's Modern Law of Evidence* (3rd edn, 1994) p 36 the part of which is
- c* relevant for present purposes reads as follows:

- ... the discretion may only be exercised in relation to evidence tendered by the prosecution. There is no discretion to exclude, at the request of one co-accused, evidence tendered by another. Thus although, as we have seen, there is a discretion to exclude similar fact evidence tendered by the prosecution,
- d* such evidence, when tendered by an accused to show the misconduct on another occasion of a co-accused is, if relevant to the defence of the accused, admissible whether or not it prejudices the co-accused.

- Accordingly, the statements made by the appellant, both oral and reduced into writing since they were exculpatory were clearly relevant and admissible. It
- e* was of no consequence that parts or all of those statements were prejudicial to the co-accused. The trial judge had no discretion whatsoever in the matter on that ground to exclude them. We have made these observations because there are passages in the learned judge's judgment that are certainly open to the interpretation that one of the grounds on which he excluded the appellant's
- f* statements was because of their prejudicial effect upon the co-accused's case.

- There is a further point that we consider to be of some importance. It is this. The only circumstance in which the appellant's statements could have been used by the prosecution against her co-accused is that set out in s. 30 of the Evidence Act 1950. It is a most familiar section to the criminal bar. Yet,
- g* because of its peculiar significance in the present instance we think it best that we remind ourselves of it. And this is what it says:

- When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court may take into consideration such
- h* confession as against such other person as well as against the person who makes such confession.

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One of the essential requirements of the section is that the statement of an accused in order to be taken into consideration against a co-accused is that it must be a confession. And a confession is defined by s. 17(2) of the Evidence Act 1950 as follows:

A confession is an admission made at any time by a person accused of an offence, stating or suggesting the inference that he committed that offence.

Now, by no stretch of the imagination can the appellant's statements be described as confessions. They were purely exculpatory statements. Hence they could not possibly have been taken into consideration against the co-accused in the present case. The point is amply covered by authority and we do not consider it necessary to go beyond referring to the following passage in Straight J's judgment in *Queen-Empress v. Jagrup* [1885] ILR 7 All 646:

What was intended was, that where a prisoner – to use a popular phrase – 'makes a clean breast of it', and unreservedly confesses his own guilt, and at the same time implicates another person who is jointly tried with him for the same offence, his confession may be taken into consideration against such other person as well as against himself, because the admission of his own guilt operates as a sort of sanction which to some extent takes the place of the sanction of an oath, and so affords some guarantee that the whole statement is a true one. But where there is no full and complete admission of guilt, no such sanction or guarantee exists, and for this reason the word 'confession' in section 30 cannot be construed as including a merely inculpatory admission which falls short of being an admission of guilt.

To sum-up, the fact that s. 37A was not complied with or the fact that the appellant's statements were prejudicial to her co-accused were not sufficient reasons in law for ruling her statements inadmissible as it was the appellant who was seeking their admission. We are therefore respectfully of the view that the learned judge was in error in not admitting her cautioned statement and in disallowing her cross-examination of PW6.

The next question to ask is whether the refusal by the learned judge to admit the appellant's statements has rendered her conviction unsafe. The learned deputy who argued the case for the respondent submitted that there has been occasioned no substantial miscarriage of justice in the circumstances of the case by reason of the learned judge's ruling on the evidential point. Having given this matter our most anxious consideration we are in agreement with that submission.

The appellant's evidence on oath is in substance the same as her earlier out of court statements, in particular, her cautioned statement. It is clear from the record that she was unable to withstand the cross-examination directed at her. At the end of the day, the learned judge found her evidence not to raise a

- a* reasonable doubt in his mind. So, her previous out of court statements could have added nothing further to her evidence. The fact that they were also exculpatory is neither here nor there on the peculiar facts of this case because the learned judge found her wanting in credibility. And, having read and re-read her printed evidence we find her story as told in her evidence and in her cautioned statement to defy credibility.
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- The degree of credence that a court is reasonably expected to assign to a particular version of events depends on the facts and circumstances of each case. And, the mere fact that an accused's evidence is consistent with his earlier out of court statements does not require a court in every case to hold that he or she is a witness of truth. Were it otherwise, the assessment of oral testimony would become a robotic function. But the judicial appreciation of evidence is a human and not a robotic function. There are no fixed rules about it: only general guidelines. That much is made clear by numerous judgments of our courts. But we would in the context of this case cite *Lim Yow Choon v. PP* [1972] 1 MLJ 205 where it was held that:
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- notwithstanding that the cautioned statement was part of the evidence for the prosecution and that there were facts in the cautioned statement which appeared to contradict other parts of the evidence led by the prosecution, it was open to the trial judge as a judge of facts to assess the evidence and in so doing accept part of it and reject the rest.
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- Having considered the evidence on record in totality, we are satisfied that any reasonable tribunal armed with the facts in this case would have come to the same conclusion as the learned trial judge about the weight to be given to the appellant's evidence. The non-admission of the appellant's cautioned and other statements would in our view have made no difference whatsoever to the final result.
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- We now turn to the final ground of appeal. The complaint here is that the learned judge had resort to s. 37(d) of the Act to presume possession and relied on that presumed possession to invoke the further presumption under s. 37(da) to hold that the appellant was a trafficker in the particular proscribed drug. In other words the learned judge had breached the rule against double presumptions laid down in *Muhammed bin Hassan v. PP* [1998] 2 CLJ 170. We have carefully scrutinised the way in which the learned judge directed himself on the law and the evidence and we find no justification in the criticism levelled against his approach to the case. It is quite apparent that the learned judge appreciated this to be a case where there was direct evidence of trafficking and it is to that evidence that he directed his mind. It was only after he had determined as a fact that the appellant was actually trafficking the heroin found in her possession that he proceeded to convict her.
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In our judgment, the learned judge's approach is amply supported by the judgment of Lord Diplock in *Ong Ah Chuan v. Public Prosecutor* [1981] 1 MLJ 64 where his lordship dealt with what trafficking involved as a matter of law. First, his lordship made it clear that passive possession or self consumption is not trafficking. He said:

To 'traffic' in a controlled drug so as to constitute the offence of trafficking under section 3 involves something more than passive possession or self-administration of the drug; it involves doing or offering to do an overt act of one or other of the kinds specified in paragraph (a) of the definition of 'traffic' and 'trafficking' in section 2.

In two later passages his lordship explained what constituted trafficking. The first passage is an extrapolation of the passage already quoted above. It reads:

So, simply to transport from one place to another a quantity of a controlled drug intended for one's own consumption, if unauthorised by the Act or Regulations, involves an offence of having the drug in one's possession under section 6 but does not amount to the offence of trafficking under section 3. It is otherwise, however, if the transporter's purpose, whether it is achieved or not, is to part with possession of the drug or any portion of it to some other person whether already known to him or a potential purchaser whom he hopes to find.

In the second passage, his lordship, while referring to the definition of trafficking in the Singapore Misuse of Drugs Act 1973 said:

This is a very wide description of acts that may be treated as equivalent to the substantive offence of trafficking; nevertheless, in their Lordships' view, it is clear from the structure of the Drugs Act and the distinction drawn between the offence of having a controlled drug in one's possession and the offence of trafficking in it, that mere possession of itself is not to be treated as an act preparatory to or in furtherance of or for the purpose of trafficking so as to permit the conviction of the possessor of the substantive offence. To bring the provisions of sections 10 and 3(c) into operation some further step or overt act by the accused is needed, directed to transferring possession of the drug to some other person; and it is a consequence of the clandestine nature of the drug trade and the means adopted for the detection of those engaged in it, that the further step that the prosecution is most likely to be able to prove in evidence is the act of the accused in transporting the drug to some place where he intends to deliver it to someone else, whether it be the actual consumer or a distributor or another dealer.

Proof of the purpose for which an act is done, where such purpose is a necessary ingredient of the offence with which an accused is charged, presents a problem with which criminal courts are very familiar. Generally, *in the absence of an express admission by the accused, the purpose with which he did an act is a matter of inference from what he did. Thus, in the case of an*

a accused caught in the act of conveying from one place to another controlled drugs in a quantity much larger than is likely to be needed for his own consumption the inference that he was transporting them for the purpose of trafficking in them would, in the absence of any plausible explanation by him, be irresistible – even if there were no statutory presumption such as is contained in section 15 of the Drugs Act.

b As a matter of common sense the larger the quantity of drugs involved the stronger the inference that they were not intended for the personal consumption of the person carrying them, and the more convincing the evidence needed to rebut it. All that section 15 does is to lay down the minimum quantity of each of the five drugs with which it deals at which the inference arises from the quantity involved alone that they were being transported for the purpose of transferring possession of them to another person and not solely for the transporter's own consumption. There may be other facts which justify the inference even where the quantity of drugs involved is lower than the minimum which attracts the statutory presumption under section 15. In the instant cases, however, the quantities involved were respectively one hundred times and six hundred times the statutory minimum.

c Whether the quantities involved be large or small, however, the inference is always rebuttable. The accused himself best knows why he was conveying the drugs from one place to another and, if he can satisfy the court, upon the balance of probabilities only, that they were destined for his own consumption he is entitled to be acquitted of the offence of trafficking under section 3.

d So the presumption works as follows, when an accused is proved to have had controlled drugs in his possession and to have been moving them from one place to another:

e (1) the mere act of moving them does not of itself amount to trafficking within the meaning of the definition in section 2; but if the purpose for which they were being moved was to transfer possession from the mover to some other person at their intended destination the mover is guilty of the offence of trafficking under section 3, whether that purpose was achieved or not. This is the effect of the provisions of section 3(c) and section 10.

f (2) If the quantity of controlled drugs being moved was in excess of the minimum specified for that drug in section 15, that section creates a rebuttable presumption that such was the purpose for which they were being moved, and the onus lies upon the mover to satisfy the court, upon the balance of probabilities, that he had not intended to part with possession of the drugs to anyone else, but to retain them solely for his own consumption. (emphasis added.)

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After *Cohen Lorraine Phillis & Anor v. Public Prosecutor* [1989] 3 MLJ 289 and *Chow Kok Keong v. Public Prosecutor* [1998] 2 CLJ 469 it is settled that the passages we have quoted from Lord Diplock's judgment apply with equal force to cases arising in our jurisdiction. See, *Looi Kow Chai v. Public Prosecutor* [2003] 1 CLJ 734.

Applying Lord Diplock's commonsense test to the present case it is clear beyond a reasonable doubt that the appellant was transporting the heroin from Thailand to this country. There was not the slightest suggestion that it was for her personal consumption, although we must say that in the light of all the evidence, including the quantity of the drug involved, such a suggestion would have sounded hollow. So, the compelling inference is that her purpose in transporting the drug was to convey it to someone else either the actual consumer or a distributor or another dealer. Nothing in the appellant's testimony went anywhere near to rebutting this natural inference, arising independent of any presumption under the Act. As we have already said, her evidence was, as correctly found by the judge, lacking in credence. Having failed to raise even a reasonable doubt as to the true purpose for which she was transporting the drug when she was apprehended, the appellant was rightly found guilty of trafficking by the learned judge.

For the reasons already given the appeal was dismissed and the conviction and sentence affirmed.

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